

traversed. First, claim 53 does further limit claim 51. Even though claim 51, in its preamble, is directed to a multi-colored chewing gum product made from a first chewing gum and a second confectionary material, there is nothing in claim 51 that requires the second confectionary material to be a different color than the first chewing gum. The first chewing gum itself could be multi-colored, or the second confectionary could be the same color as the first chewing gum, but a third material of a different color could be present, making the overall product multi-colored. Since claim 51 could read on products where the first chewing gum and second confectionary material are the same color, claim 53, requiring them to be different colors, does further limit claim 51.

Similarly, the product-by-process nature of claim 56 also adds further limitations not found in claim 51. The product of claim 51 could conceivably be made by embedding the rope of second confectionary in the first chewing gum before or at the same time the first chewing gum is formed into a slab. The MPEP makes it clear that product-by-process claims may be utilized to present claims of varying scope. MPEP § 2173.05(p) (8th Ed.). In this case, claim 56 requires the first chewing gum to be formed into a slab and then the scope of second confectionary pressed into the slab. This is a further limitation on claim 51.

The term “generally” in claims 1, 15, 18, 20 and 21 does not make those claims indefinite. MPEP § 2173.05(b) sets forth that words of relative terminology are acceptable if one of ordinary skill in the art would understand what is claimed in light of the specification. In the claims at issue, the word “generally” modifies “flat sheet,” “flat surface” and “undulating pattern.” Page 8 of the specification states that in Figure 8 the first mass of chewing gum is formed into a slab 81 with a generally flat top surface, and then gives example methods of making such a “generally flat top surface.” One of ordinary skill in the art, referring to Figure 8 and the type of operations described on page 8, would easily be able to understand what “generally flat” means. In the art of chewing gum, it is very difficult to get something exactly flat, but if someone of ordinary skill looked at slab 81 in Figure 8, they would easily recognize it as generally flat. Likewise, a person or ordinary skill in the art would be able to tell what was meant by “generally flat sheet” and “generally undulating pattern” as those phrases are used in the claims.

In the outstanding Office Action, claims 1-6, 9, 22 and 28 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. Des. 271,535 (Huzinec '535) (or possibly U.S. Patent No. Des. 271,534 (Huzinec '534)) or U.S. Patent No. Des. 271,344 (Faust) in view of U.S. Patent No. 1,855,145 (Jones) and further in view of the "Bubble Tape" and "Fruit Stripes" products referred to on page 1 of the specification. This rejection is respectfully traversed.

The Office Action takes the position that Huzinec and Faust disclose two layer chewing gum with one embedded in the other so that the top layer is not viewable from the bottom. Claim 1, however, calls for the second mass to be smaller than the first mass and be embedded in the first mass so as to be visible with the first mass from the top surface of the product, but the first mass only is visible from the bottom surface. The primary references do not meet this limitation. In Huzinec '535, no matter which side is taken to be the top, only one color of chewing gum is found in that surface. In Huzinec '534, the description states that the bottom view is identical to the top view. Hence the second color of chewing gum would be viewable from both the top and bottom surfaces. Finally, Faust has the same deficiency. No matter which side is considered to be the top, the bottom will have both colors of chewing gum present.

Jones discloses an edible article such as a candy bar. The form of the product, and the use of two different materials to make it, is such that the eater is compelled to automatically partake of the product such that each bite has a different composition than the previous bite, thus overcoming the problem that the sense of taste becomes saturated in a small amount of time, and the last bite of a candy bar does not taste as good as the first. Figure 10 of Jones discloses a bar having a constant proportion of one material formed as a base upon which is placed a bar having a progressively changing composition.

Jones would not suggest to one of ordinary skill in the art to modify the chewing gum products of Huzinec or Faust to come up with the claimed invention. First, it is not even clear that Faust would consider the idea applicable to chewing gum, which is not swallowed bite after bite as would be the product in Jones. Since the two color chewing gum products of Huzinec and Faust would normally be placed in the mouth all at once, and chewed over a period of time, there would be no advantage to putting one color of

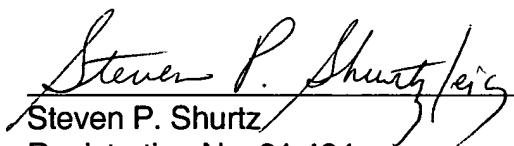
chewing gum in the form of a stripe so that each bite has a different composition. Second, the products of Faust and Huzinec are chunks of gum, rather than bars as used in Jones. Third, chewing gum is quite different than the candy bar, cake and ices disclosed in Jones, therefore it would not have been obvious to apply the teachings of Jones to the Huzinec or Faust products.

The Bubble Tape and Fruit Stripes products do not make the invention of claim 1 obvious. Bubble Tape does not include multiple components, so the concept of a pattern on one side and no pattern from the bottom could not be suggested by the product. Fruit Stripes has a stripe that shows on both sides. Only Figure 10 of Jones is a product with one composition entirely making up a base and two compositions making up a top surface. However, while such a product could be readily formed using a chocolate base, it would not be obvious from even Jones of how to make such a product where the first mass is chewing gum.

The Office Action cites *In re Levin*, 84 U.S.P.Q. 232 as supporting the rejection. However, that case is not applicable to the present claims. Levin deals with a new recipe or formula for cooking food. The present claims deal with a structure and configuration of an edible material, not the recipe or formula for making the individual first and second masses.

Since it would not have been obvious from the cited references to come up with the invention of claim 1, claim 1 and claims 2-6, 9, 15, 22 and 28 dependent thereon are patentable over the cited references.

Respectfully submitted,

  
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